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APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUE980463

**To revise its cogeneration tariff
pursuant to PURPA Section 210**

RULING ON MOTION FOR PROTECTIVE ORDER

November 20, 1998

On November 9, 1998, Virginia Electric and Power Company ("Virginia Power" or "Company") filed a Motion for Protective Order and a proposed Protective Order in the above-captioned proceeding. Company states that it has received data requests from certain parties and Commission Staff. Virginia Power requests that the Commission enter a Protective Order to set forth the procedures by which confidential information shall be handled generally in this proceeding.

On November 19, 1998, the Commission issued a Protective Order in *Application of Virginia Electric and Power Company, For approval of Expenditures for New Generation Facilities pursuant to Va. Code § 56-234.3 and for a Certificate of Public Convenience and Necessity Pursuant to Va. Code § 56-265.2*, Case No. PUE980462 in which the Commission addressed a similar request to that now pending in this case.

UPON CONSIDERATION of Virginia Power's request and the Commission's recent order addressing a similar request, I am of the opinion and find that protective provisions comparable to those adopted by the Commission yesterday are also appropriate in this case. Accordingly,

IT IS DIRECTED THAT any documents, materials, and information to be produced by Virginia Power, either for itself or for its affiliates, or to be produced by any other party ("Other Party") in this proceeding in response to Commission orders, Hearing Examiner Rulings, Commission Staff ("Staff") data requests or properly propounded interrogatories or requests for production of documents in this proceeding, which documents, materials, or information the producing party designates as confidential ("Confidential Information"), shall be examined and used only in accordance with the following conditions:

(1) All Confidential Information produced to Virginia Power, Staff, or Other Parties shall be used solely for the purposes of this proceeding (including any appeals).

(2) Access to Confidential Information shall be specifically limited to Virginia Power, Staff or Other Parties, their counsel and expert witnesses, and to support personnel who are working on this case under the direction of their counsel or expert witnesses and to whom it is necessary that the Confidential Information be shown for the purposes of this

proceeding, so long as each such person has executed an Agreement to Adhere to the Protective Provisions ("Agreement"), which is Attachment A to this Ruling. All Agreements must be promptly forwarded to the producing party upon execution.

(3) In the event that Virginia Power, Staff or Other Parties seek permission to grant access to any Confidential Information to any person other than the persons authorized to receive such information under paragraph (2) above, the party desiring permission shall obtain the consent of counsel for the producing party. In the event of a negative response, the party seeking disclosure permission may apply to the Commission for such permission.

(4) The producing party shall be under no obligation to furnish Confidential Information to persons other than those authorized to receive such information under paragraph (2) above unless specifically ordered by the Commission or Hearing Examiner to do so. Parties are encouraged to seek consents to the maximum extent practicable.

(5) In the event that Virginia Power or Other Parties contend that they should not be required to produce specific documents, materials or information due to their commercially or competitively sensitive nature ("Competitively Sensitive Information"), Virginia Power or such Other Party shall bear the burden of proving that such specific documents, materials, or information should not be discoverable, including a showing that the information cannot be adequately protected by an appropriate nondisclosure agreement. For purposes of responding to data requests propounded by the Staff or the Division of Consumer Counsel, Office of the Attorney General ("Attorney General") in this proceeding, the production and handling of Competitively Sensitive Information shall be governed by the terms of an appropriate nondisclosure agreement between the producing party and the Staff or the Attorney General.

(6) A party withholding Competitively Sensitive Information from any participant¹ shall immediately provide all participants with a log enumerating all such information. The log shall specify the following about the information withheld: (i) the original requesting party; (ii) the data request number and date of the request; (iii) the type of information (e.g., computer-stored information, microfilm, letter, memorandum, policy circular, minute book, telegram, chart, etc.) or some other means of identifying it; (iv) its present location and custodian; (v) the nature of the information; (vi) the basis for the claim that the information is competitively sensitive. The withholding party shall telefax updates to the log, if any, to all participants on the first occasion "Competitively Sensitive Information" is withheld from any participant, and thereafter on a weekly basis, for the duration of this proceeding. The obligations imposed by this paragraph shall be in addition to the withholding party's obligation to make specific objections to a data request that seeks Competitively Sensitive Information.

(7) The Clerk of the Commission is directed to maintain under seal all documents, materials, and information filed with the Commission in this proceeding which the producing party has designated, in whole or in part, as Confidential Information or Competitively Sensitive Information.

¹ For purposes of this Ruling the term "participant" means all parties and Staff.

(8) In the event Virginia Power, Staff or Other Parties seek to introduce at a hearing testimony, exhibits, or studies that disclose Confidential Information, the Staff or the party seeking such introduction shall:

- (a) notify the producing party at least three (3) days in advance of any such hearing regarding testimony that is not prefiled unless a shorter period would not unduly prejudice the producing party;
- (b) if such testimony is prefiled, file such testimony, exhibits or studies with the Commission under seal and serve on all parties of record copies of the testimony, exhibits, or studies deleting those parts that contain references to or portions of the designated Confidential Information. The testimony, exhibits, or studies containing the Confidential Information filed with the Commission shall be kept under seal unless and until the Commission rules to the contrary. Each party shall, upon signing Attachment A hereof, receive a copy of those parts of the testimony, exhibits, or studies that contain references to or portions of the Confidential Information and each party and counsel shall be bound hereby insofar as the use of and granting of access to the Confidential Information is restricted.

(9) Oral testimony regarding Confidential Information, if ruled admissible by the Commission or Hearing Examiner, will be taken in camera and that portion of the transcript recording such testimony shall be placed in the record under seal.

(10) In the event Virginia Power, Staff, or Other Parties seek to introduce at a hearing testimony, exhibits or studies that disclose Competitively Sensitive Information, the Staff or the party seeking such introduction shall notify the producing party at least three (3) days in advance of any such hearing unless a shorter period is necessary or would not unduly prejudice the producing party. Any testimony regarding Competitively Sensitive Information shall be taken in camera and in the presence of only those persons who have been granted access to the specific Competitively Sensitive Information pursuant to a nondisclosure agreement with the producing party and such other persons the Commission may designate and who, upon designation, execute an appropriate non-disclosure agreement satisfactory to the Commission. That portion of the transcript recording such testimony shall be placed in the record under seal.

(11) In the event Virginia Power, Staff or Other Parties prefile with the Commission and serve on other participants other testimony, exhibits or studies from which Competitively Sensitive Information has been deleted, the participant shall immediately notify all participants and provide them with a general description of the Competitively Sensitive Information that has been deleted. To satisfy this requirement, the participant shall refer to a specific entry or entries on the log required by Paragraph (6) hereof, if applicable. Otherwise, the participant shall describe the deleted Competitively Sensitive Information by providing substantially the same information required by Paragraph (6). The notification shall be made by telefax on or before the first business day after the filing of the written testimony, exhibits or studies. In the event Virginia Power, Staff or Other Parties seek to introduce testimony, exhibits or studies containing references to Competitively Sensitive

Information at a hearing, such notification shall be provided under the supervision of the Commission or the Hearing Examiner.

(12) No person authorized hereunder to have access to Confidential Information shall disseminate, communicate, or reveal any such Confidential Information to any person not specifically authorized under this Ruling to have access.

(13) At the conclusion of this proceeding (including any appeals), any originals or reproductions of any Confidential Information produced pursuant to this Ruling shall be returned by Virginia Power and Other Parties to the producing party (or destroyed) if requested to do so by the producing party. At such time, any originals or reproductions of any Confidential Information in Staff's possession will be returned to the producing party, destroyed or kept with Staff's permanent work papers in a manner that will preserve the confidentiality of the Confidential Information. Insofar as the provisions of this Ruling restrict the communications and use of the Confidential Information produced thereunder, such restrictions shall continue to be binding after the conclusion of this proceeding (including any appeals) as to the Confidential Information.

(14) This Ruling does not preclude Virginia Power, Staff or any Other Party from arguing, prior to public disclosure, that documents, materials, and information received hereunder should not be treated as confidential. But in no event shall any party disclose Confidential Information it has received subject to this Ruling absent a finding by the Commission or Hearing Examiner that such information does not require confidential treatment. If Virginia Power, Staff or any Other Party desires to make such an assertion, the producing party shall be given reasonable notice before being required to bear the burden of proving the contrary, and reasonable notice shall be at least three (3) days in advance of a hearing in connection with testimony that is not prefiled and that contains Confidential Information. The burden of proving that documents, materials, or information require confidential treatment as trade secrets, commercially or personally sensitive information, or other grounds for confidential treatment shall be upon the proponent of maintaining the documents, materials, or information in confidence.

(15) A producing party is obligated to separate non-confidential and noncompetitively sensitive documents, materials, and information from Confidential Information and Competitively Sensitive Information wherever practicable, and to provide the non-confidential and noncommercially sensitive documents, materials, and information.

Deborah V. Ellenberg
Hearing Examiner